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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF HOUSTON, TEXAS,
Petitioner,

v.

ANNE M. GORSUCH, ADMINISTRATOR, and
ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Clean Air Act and the "taking" clause of the Fifth Amendment of the United States Constitution permit the Administrator of the Environmental Protection Agency to refuse to consider natural conditions in promulgating primary and secondary national ambient air quality standards, even if the result may be to impose severe restrictions on human activity in a major city because of violations attributable to natural conditions.

2. Whether it was arbitrary, capricious and an abuse of discretion for the Administrator of the Environmental Protection Agency to reject evidence that mandatory control regulations for attaining the national ambient air quality standards for ozone will not work in Houston, Texas.

LIST OF PARTIES

The parties before the court of appeals included the City of Houston; the American Petroleum Institute and 15 of its member companies (Atlantic Richfield Company, Continental Oil Company, Exxon Company U.S.A., Getty Oil Company, Gulf Oil Corporation, Grace Petroleum Corporation, Kerr-McGee Corporation, Mobil Oil Corporation, Pennzoil Company, Shell Oil Company, Standard Oil Company (Indiana), The Standard Oil Company (Ohio), Texaco Inc., Union Oil Company of California, and Witco Chemical Corporation); the Chemical Manufacturers Association and four of its member companies (American Cyanamid Company, Diamond Shamrock Corporation, Ethyl Corporation, and Northern Petrochemical Company); the Commonwealth of Virginia, *ex rel.* the State Air Pollution Control Board; E. I. du Pont de Nemours & Company; the St. Louis Regional Commerce and Growth Association; the State of Oklahoma; the Natural Resources Defense Council; the Delaware Valley Citizens Committee for Clean Air, Inc.; the Connecticut Lung Association, Inc.; the American Lung Association; and the Sierra Club.

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Respondents.[1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The City of Houston, Texas, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals [Appendix ("App."), *infra*] is not yet reported. The statements of basis and purpose for the regulations of the Environmental Protection Agency at issue in this case are reported at 44 Fed. Reg. 8202 (1979) and 44 Fed. Reg. 8237 (1979).

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Pursuant to Supreme Court Rule 40.3, the caption of this case has been changed in this petition to reflect the fact that Anne M. Gorsuch has replaced Douglas M. Costle as Administrator of the Environmental Protection Agency.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment of the United States Constitution in pertinent part provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,
>
> * * * *
>
> nor shall private property be taken for public use, without just compensation . . . .

The Clean Air Act, in pertinent part provides:

Clean Air Act § 108, 42 U.S.C. § 7408

Air quality criteria and control techniques

(a) (2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on

> (A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such pollutant;
>
> (B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and
>
> (C) any known or anticipated adverse effects on welfare.

Clean Air Act § 109, 42 U.S.C. § 7409

National primary and secondary ambient air quality standards

Protection of public health and welfare

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutants in the ambient air. Such secondary standards may be revised in the same manner as promulgated . . . .

Clean Air Act, § 110, 42 U.S.C. § 7410

State implementation plans for national primary and secondary ambient air quality standards

Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which

provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and mainte-

nance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator.

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7425 of this title, relating to interstate pollution abatement . . . .

Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the requirements of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H) of this section . . . .

The EPA regulations in issue in pertinent part provide:

National primary and secondary ambient air quality standards for ozone, 40 C.F.R. § 50.9

(a) The level of the national primary and secondary ambient air quality standards for ozone measured by a reference method based on Appendix D to this part and designated in accordance with Part 53 of this chapter, is 0.12 per part million (235 ug/m3). The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 part per million (235 ug/m3) is equal to or less than 1,

as determined by Appendix H. 44 Fed. Reg. 8220, col. 3 (1979).

* * * *

(7) In selecting an appropriate model to determine the amount of hydrocarbon reductions necessary to demonstrate attainment of the ozone standard, one of the following techniques must be applied:

(i) Photochemical dispersion models — These models are based on the most accurate available physical and chemical principles underlying the formation of ozone.

(ii) Empirical Kinetics Modeling Approach (EKMA)—This model represents a compromise between rigorous treatment of chemical and physical principles underlying ozone formation and dispersion and the extensive data requirement that would be necessitated by such an approach.

(iii) Empirical and statistical models—These models reflect observed relationships between ozone and other variables.

(iv) Proportional rollback—This model assumes a linear relationship between hydrocarbon emissions and ambient concentrations of ozone.

* * * *

(8) In developing an ozone control strategy for a particular area, background ozone concentrations and ozone transported into an area must be considered. States may assume that the ozone standard will be attained in upwind areas . . . .

Control strategy: Carbon monoxide, hydrocarbons, ozone, and nitrogen dioxide, 40 C.F.R. § 51.14

(a) *Priority I Regions.* (1) Each plan for a region classified Priority I with respect to carbon monoxide, ozone, or nitrogen dioxide shall set forth a control strategy which shall provide for the degree

of emission reduction necessary for attainment and maintenance of the national standard for each such pollutant after consideration of the emission reductions that will result from the application of Federal motor vehicle emission standards promulgated pursuant to section 202 of the Act.

(2) The plan shall contain: (i) A description of enforcement methods including, but not limited to, procedures for monitoring compliance with the selected traffic control measures, procedures for handling violations, and a designation of enforcement responsibilities (*i.e.*, air pollution control agency, State police, State Department of Motor Vehicles, State Registrator of Motor Vehicles, etc.)

(ii) Proposed or adopted rules and regulations pertaining to the selected transportation control measures.

(iii) A description of administrative procedures to be used in implementing all selected transportation control measures, including, but not limited to, methods of achieving transportation improvements and a designation of responsibility for administration of such procedures (*e.g.*, State Treasurer responsible for purchase of buses).

(iv) A schedule designating dates by which legal authority necessary to implement the plan will be obtained, other significant steps in the implementation of the plan will be achieved and each control measure will be implemented.

(b) *Control strategy development.* In a region in which attainment and maintenance of a national standard will require emission reductions in addition to those which will result from application of the Federal motor vehicle emission standards, the control strategy shall provide for application of such other measures as may be necessary for attainment and maintenance of such national standard.

(c) *Adequacy of control strategy.* (1) The plan shall demonstrate, by means of a proportional model or diffusion, photochemical model or other procedure which is adequate and appropriate, that the control strategy included in each plan for a region classified as priority I is adequate for attainment and maintenance of the national standard(s) to which such control strategy applies. Control measures shall not result in an increase in the concentration of any pollutant to a level that exceeds a national ambient air quality standard. The plan shall include provisions as necessary to prevent such increases in concentrations as a result of traffic increases that may be stimulated by transportation control measures . . . .

STATEMENT OF THE CASE

Ozone is produced in the atmosphere through complex chemical reactions between organic compounds ("precursors") and nitrogen oxides in the presence of sunlight. App. at 6a. "Precursors" include hydrocarbon emissions from vehicles and from industrial sources, and natural emissions from vegetation. *Id.* In addition, ozone from the stratosphere may intrude into the lower atmosphere. *Id.* In 1979, respondent Environmental Protection Agency ("EPA") promulgated regulations establishing national primary and secondary ambient air quality standards for ozone, pursuant to §§ 108 and 109 of the Clean Air Act, 42 U.S.C. §§ 7408, 7409. 44 Fed. Reg. 8202 (1979), *codified* at 40 C.F.R. § 50.9 (1981). The regulations restrict the maximum permissible ozone levels, under both the primary and secondary standards, to 0.12 parts per million ("p.p.m."), which may not be exceeded more often than an average of one day in any three-year period. 44 Fed. Reg. at 8220. The standard must be met by December 31, 1982 or, with an extension for good cause shown, no later than December 31, 1987. 42 U.S.C. § 7502. At the same time, the EPA promulgated regulations that force the States, in draft-

ing implementation plans to carry out the new standard, to choose one of four "models" for determining the amount by which hydrocarbon emission must be reduced in order to achieve the ozone standard, 44 Fed. Reg. 8237 (1979), *codified at* 40 C.F.R. § 51.14(c)(7) (1981).

Petitioner, the City of Houston, Texas ("Houston"), participated in the rulemaking through its City Health Department. Houston was concerned that the City's high levels of ozone of natural origin would not be adequately considered by the agency in setting the standard and in establishing a workable control strategy. Even in the absence of emissions from industry, transportation or other human activity, natural sources in Houston create relatively high concentrations of ozone, making compliance with the standard impossible for the indefinite future. Rulemaking Record, II-D-97; VI-18; IIA-E(1)-47; Joint Appendix ("J.A.") 1613-16; 1621-29; 1651-55.

Houston presented evidence that natural sources generate ozone levels ranging from 0.04 to as high as 0.13 p.p.m. in the Houston area. Rulemaking Record, Houston Petition, II-D-97 at 45-46. High ozone levels have persisted in Houston despite a 40% reduction in man-made hydrocarbon emissions. *Id.* at 18-19.

The agency refused to consider natural conditions in Houston. EPA did recognize, however, that natural conditions may have a substantial effect upon ambient ozone levels. For example, in its brief to the court of appeals, EPA justified its "rolling three-year average" method of measuring compliance, which permits an average of one day per year in which the ozone level exceeds the standard for one hour or more, as an attempt to factor out "the effects of unusual weather conditions in any single year." EPA Brief to D.C. Circuit at 143, citing 43 Fed. Reg. 23,968 (1978) (notice of proposed rulemaking). In criticizing Houston's evidence that ozone emissions in the Houston area have not declined despite declining man-made hydrocarbon emissions, the agency insisted that a

much longer period of study is essential to factor out the effects of adverse weather conditions—thus, once again recognizing the impact of natural forces on ozone levels. 44 Fed. Reg. at 8235. In the preamble to the regulation, the agency also acknowledged that:

> The maximum ozone concentrations which will occur in any given time period will vary from one period to the next, even if precursor emissions remain constant. These variations are mainly due to the random nature of meteorological factors which affect the formation and dispersion of ozone in the atmosphere.

44 Fed. Reg. at 8218. The agency admitted that natural background levels of ozone may exceed 0.08 p.p.m. at a "not insignificant" rate, but contended, generally, that a natural level in excess of 0.12 p.p.m. "can be considered quite rare at any particular location." 44 Fed. Reg. at 8212.[2]

Because Houston's high total ozone levels have persisted even in the face of substantial reductions in local hydrocarbon emissions, J.A. 1269, 1651-55, Houston also expressed concern that a control strategy directed solely toward the further reduction of hydrocarbon emissions without any consideration of the impact of oxides of nitrogen emissions would not effectively reduce ozone levels in Houston. Rulemaking Record, II-D-97; J.A. 1613-15.

With respect to Houston's first concern—the problem of natural ozone—the court of appeals on review[3] re-

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[2] EPA referred generally to unspecified data which it had assertedly compiled over a number of years. *Id.*

[3] The court of appeals had jurisdiction to review the rulemaking under 42 U.S.C. § 7607.

jected Houston's argument that the 0.12 p.p.m. standard should be invalidated because natural conditions make attainment physically impossible. Relying upon its decision in *Lead Industries Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir.), *cert. denied*, 449 U.S. 1042 (1980), the court of appeals approved EPA's refusal to consider whether the standards were economically or technologically feasible or even attainable at all. App. at 15a. Indeed, the court expressly ruled that "[a]ttainability and technological feasibility are not relevant considerations in the promulgation of national ambient air quality standards." *Id.* Citing *Natural Resources Defense Council v. EPA*, No. 79-1639 (D.C. Cir. filed May 7, 1981), the court of appeals added that the agency need not create local exceptions to national ambient air quality standards. *Id.* On the same theories, EPA also refused even to place in the rulemaking record one of its own studies of the impact of natural hydrocarbon emissions on ozone formation, which had been secured from the agency by the American Petroleum Institute, the petitioner in No. 81-871, under the Freedom of Information Act. J.A. 1003, 1073.

With respect to Houston's second concern—that EPA's prescribed control strategy would be ineffective—the agency rebuffed Houston's challenge to the mandatory hydrocarbon control strategy regulations by questioning Houston's evidence that declining hydrocarbon emissions in Houston have not reduced ozone levels. EPA argued that other studies support the general proposition that a reduction in hydrocarbon emissions will assist in the reduction of ozone levels; that Houston would have to collect data for five to eight years before its evidence would have any meaning; and that Houston's studies had failed to "normalize the trends for meteorological differences." 44 Fed. Reg. at 8235.

REASONS FOR GRANTING REVIEW[4]

I. The Agency and the Court of Appeals Erroneously Refused to Consider Whether the Ozone Standard Will Penalize Houston for Failing to Do the Impossible.

This case presents a novel issue of substantial and wide-ranging importance—whether the Clean Air Act permits the Administrator of the EPA to establish a national ambient air quality standard that is unlikely ever to be met by one of the largest cities in the United States, not because the standard is economically or technologically infeasible, but simply because natural conditions inevitably place that city in a position of noncompliance. In this case, the agency has refused to consider evidence that Houston may not meet the prescribed standard even if human activity in Houston were substantially reduced or eliminated entirely.

It need not be said that the Clean Air Act is designed to reduce human, not natural, emissions. The Act does not require the States to restrict the emissions of plant and animal life or to control the weather.[5] Nor may the Act be so construed. It is a basic principle of statutory construction that a statute should not be construed to require the absurd or the impossible. *See e.g., Quinn v. Butz*, 510 F.2d 743, 753 (D.C. Cir. 1975) ("The construction of a statute leading to unjust or absurd consequences should be avoided."); *Melong v. Micronesian Claims Comm'n*, 569 F.2d 630, 634 (D.C. Cir. 1977) ("A construction . . . leading . . . to patent absurdity is obviously to be avoided"); *Brady v. City and County of*

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[4] Houston concurs with the petition of the American Petroleum Institute in No. 81-871, but shall not in this petition reiterate API's reasons for granting review.

[5] *See, e.g.*, 42 U.S.C. § 7410(a)(2), which provides that air quality standards are to be met by controls on emissions resulting from human activity, such as transportation controls, vehicle inspection programs, stationary source standards for the operation and new construction of manufacturing plants, and the like.

Denver, 508 P.2d 1254, 1256 (Colo. 1973) ("No provision of law should be interpreted in a way which requires an impossible task."). Here, the agency and the court of appeals would permit just such an absurd result by refusing even to consider the effects of climatic conditions and natural ozone sources. As one of the agency's Science Advisory Board[6] members noted, "if you were to go to the standard setting and set the standards lower than the natural background, this would be purely ridiculous." J.A. Ex. 2 at 100.[7]

The Congress may have intended to rely, in part, upon "technology forcing" (requiring future compliance with a standard that might be met only with the development of new technology), or may have accepted the possibility that businesses that could not find economically feasible means of compliance would be forced to close their doors.[8] It is inconceivable, however, that Congress, through the Clean Air Act, intended EPA to impose requirements that are unattainable because of nature and then to saddle one of the largest cities in the United States with a *futile* attempt to comply with an impossible air quality standard.[9]

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[6] Congress has required the agency to consult with a "Science Advisory Board" in the course of promulgating air quality standards. 42 U.S.C. § 4365. *See* the API petition in No. 81-871.

[7] In addition, a researcher for the National Science Foundation studying the "intrusion" of natural ozone from the stratosphere warned EPA that the level from intrusion alone could reach 0.25 p.p.m. for one hour, and wondered aloud as to what the agency would do if "Mother Nature" violated the standard. J.A. Ex. 1 at 4-51; Rulemaking Record IV-F-11 at 40, 43.

[8] *See* n.12, *infra*.

[9] The evidence in the rulemaking record has been further substantiated by the subsequent report of the National Commission on Air Quality, *To Breathe Clean Air* (1981), which concludes that Houston and several California cities will regularly exceed the standard even after 1987. *Id.* at 121, 126. EPA subsequently recognized, in part, the impossible burden which it has imposed

With the standard in place, Texas is obligated to produce a state implementation plan which will assure Houston's compliance by the final statutory deadline, December 31, 1987. 42 U.S.C. § 7410.[10] If Houston businesses cannot comply, they may be closed down.[11] Natural ozone levels will ensure that the net impact of any attempt at full compliance will be severe.[12] Given the

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upon Houston and other cities, and authorized Texas to submit a state implementation plan which would postpone Houston's day of reckoning beyond 1987. 46 Fed. Reg. 7182 (1981). EPA questioned its own statutory authority to permit such a delay; imposed a requirement of a particularly clear showing that the 1987 deadline cannot be met; and offered no opinion as to whether Houston could meet even such an extended deadline. *Id.* The agency's interpretation is no less absurd merely because the Clean Air Act contemplates a uniform national standard. Moreover, the only authority cited by the court of appeals for excusing the agency on this ground was its opinion in Natural Resources Defense Council v. EPA, No. 79-1639, slip op. at 34 (D.C. Cir. May 7, 1981). There, the court rejected an argument presented by the City of Anchorage, Alaska, to the effect that the city would have great difficulty monitoring compliance with the EPA's standards for water pollution because of the 30-foot tides in Cook Inlet and because of the presence of ice in the inlet in winter. Citing no authority, the court rejected the city's concerns with a one-sentence statement that because the Act contemplates national standards, the agency need not consider local compliance problems. However, the court was concerned that the regulations were unduly inflexible and relied, in part, upon EPA's assurance that the regulations "will be enforced with flexibility and discretion." *Id.* Here, by contrast, the standard may not be met at all due to natural conditions and no similar assurance has been offered.

[10] As noted above, n.9, it may now be possible for Houston to postpone this date for some period beyond 1987.

[11] In Union Elec. Co. v. EPA, 427 U.S. 246, 258-59 (1976), this Court noted that the Senate committee that considered the Clean Air Act "determined that existing sources of pollutants either should meet the standard of the law or be closed down . . ." S. Rep. No. 91-1196 91st Cong., 1st Sess. 2-3 (1970).

[12] Unlike an industrial business entity faced with serious compliance problems, Houston may not ask Texas to impose a heavier

indisputable premise of the Clean Air Act that the primary and secondary ambient air quality standards are to be achieved by controlling man-made emissions, whether through present or future control technology or by closing down emission sources, it was an error for the agency and the court of appeals to refuse to permit consideration of Houston's evidence that natural ozone levels would exceed or easily force Houston over the standard. The significance of this basic issue of statutory construction to Houston and to the other sectors of the United States which may face similar problems is substantial and warrants this Court's consideration.[13]

If the statute must be construed to permit the imposition of severe standards upon Houston with no prospect of compliance, due to natural conditions, then the Act must pass muster under the "taking" clause of the Fifth Amendment of the United States Constitution. This Court has identified two tests to be used to determine whether an unconstitutional taking has occurred: (1) whether the regulation is "not reasonably necessary to the eflectuation of a substantial public purpose"; or (2) whether it has an "unduly harsh impact upon the owner's use of the property." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978). *See also Nectow v. City of Cambridge*, 277 U.S. 183 (1928). In this case, the regulations are not "reasonably necessary to the effectuation of a substantial public purpose" if forces of nature will cause them to be violated in Houston regardless of efforts to control man-made emissions and if, as

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burden on another area so that Houston may face less stringent controls. *See Union Electric, supra*, 427 U.S. at 266.

[13] In addition to Houston, EPA expects a "few" other urban areas to fail to comply with the standards by 1987. 46 Fed. Reg. 7182 (1981). A total of 24 states have requested extensions to 1987 to comply with the ozone standard. *Id.* at 7190. The National Commission on Air Quality expects at least 32 U.S. counties to be in violation of the standard after 1987. *To Breathe Clean Air* 143 (1981).

discussed below, the emission controls prescribed by the regulations are not effective in reducing ozone levels in Houston. The regulations are "unduly harsh" if, as the court of appeals found, Houston must attempt full compliance regardless of natural ozone levels.

II. The Agency Arbitrarily and Capriciously Rejected Houston's Evidence that EPA's § 110 Control Strategy Regulations Will Not Work in Houston.

EPA compounded its error in refusing to consider Houston's evidence of the impact of the natural production of ozone by also refusing to consider the impact of its control strategy regulations on Houston. Despite the evidence that substantial reductions of hydrocarbon emissions have not reduced ozone levels in Houston, EPA's prescription for compliance is to keep on requiring ever greater reductions in hydrocarbon emissions. EPA argues that Texas and Houston have discretion to impose additional controls on oxides of nitrogen on top of the mandatory hydrocarbon emission reductions if they choose. But EPA refused to consider the possibility that its regimen of hydrocarbon reductions would be a pointless exercise for the citizens of Houston.

The control strategy regulations are in the form of a directive that each State implementation plan for the attainment of the ozone standard shall contain provisions for the reduction of hydrocarbon emissions. The extent to which hydrocarbon emissions must be reduced is to be measured by one of four "models," each of which provides a separate method for projecting expected reductions in ozone, and all of which require substantial reductions of hydrocarbons. 40 C.F.R. § 51.14(c)(7) (1981).

Each of the "models" for measuring the probable success of state implementation plans in reducing ozone levels is based entirely upon the supposition that a reduction in hydrocarbon levels shall be uniformly

effective in all parts of the United States.[14] EPA's regulations therefore refuse to accept any state implementation plan that does not purport to reduce ozone levels to the standard by reducing hydrocarbon emissions. Even if there is to be only one, national, standard of air quality, it does not follow that the EPA therefore should be entitled to impose control strategies that do not and cannot work in particular areas, even with the imposition of draconian control measures.

In this case, Houston argued, *inter alia*, that its evidence demonstrated that the agency should consider the impact of the emission of oxides of nitrogen ("NOx") and the mix of such oxides with hydrocarbons in Houston. 44 Fed. Reg. at 8205.[15] EPA's response was that

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[14] One model, the "EKMA" model, permits some consideration of nitrogen oxide levels, but only if the City pursues an even greater reduction of hydrocarbon levels, which to date has been ineffective. EPA brief to D.C. Circuit at 140 n.134; J.A. 1645. In 1981, the agency proposed to eliminate the "proportional rollback" control strategy "model." 46 Fed. Reg. 7193 (1981).

[15] The correctness of Houston's position has been further confirmed by the subsequent report of the National Commission on Air Quality, *To Breathe Clean Air* 141 (1981), which concluded:

> Commission and other studies indicate that further control of both hydrocarbon and nitrogen oxides emissions will be necessary to enable areas exceeding the ozone standard to meet this standard (Shutler, 1980; SAI, 1980b). The basic chemistry of ozone formation from hydrocarbons and nitrogen oxides is well established and does not vary from site to site. However, the effect of controlling hydrocarbon or nitrogen oxides emissions will vary depending upon such local conditions as the ratio of hydrocarbon emissions to nitrogen oxides emissions in the atmosphere. The Commission's panel of experts stated that controlling hydrocarbons will almost always have a beneficial effect on reducing ozone levels except in areas with severe ozone non-attainment problems. [N.B.—such as Houston.] Control of hydrocarbon alone is more likely to have little or no effect where there are very high levels of hydrocarbons compared to the levels of nitrogen oxides. (Shutler, 1980).
>
> The role of nitrogen oxides in ozone production is an important factor in determining the benefits of controlling emissions of

Houston and Texas would have to determine for themselves what should be done with NOx emissions, drafting their own standards as necessary to comply with the national ozone standard. *Id.* In effect, EPA's response is that even if a reduction of hydrocarbon emissions in Houston would be pointless, Houston, while incurring the costs of such a futile exercise, could, *in addition*, adopt potentially efficacious NOx emission standards.

EPA also pointed to evidence in the record that supports the general proposition that ozone levels are dependent, at least in part, upon the level of hydrocarbons in the atmosphere. Even if this proposition is correct, it does not follow that the reduction of hydrocarbon emissions generated through human activity in the Houston area will reduce the ozone level in Houston to the 0.12 p.p.m. standard that EPA has set. EPA implicitly conceded as much when it attempted to discount Houston's data by arguing that Houston had not factored out Houston's climatological conditions. Indeed, the record is replete with evidence that climatological conditions may have a direct and immediate effect on ozone levels, as noted above. Moreover, EPA belittled Houston's evidence by applying it against an impossible standard—contending that only a study of up to eight years' duration could be considered accurate, and apparently believing that this was a good reason to refuse to confront the problem in the meantime. As to the impact of NOx emissions, EPA concluded only that its "data base" was

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hydrocarbons or nitrogen oxides. Emissions of nitrogen oxides can either reduce or increase ozone levels, depending on local conditions.

* * * *

After considering the costs and benefits of nitrogen oxides control, the Commission's panel of experts supported additional reasonable controls of nitrogen oxides. However, the panel emphasized that the complex behavior of hydrocarbons, nitrogen oxides, and ozone in the atmosphere dictates that different control plans should be developed for different areas of the country. (Shutler, 1980).

insufficient to establish the impact of ozone precursors other than hydrocarbons. 44 Fed. Reg. at 8205. EPA simply refused to come to terms with the question whether the control strategy would work in Houston.

EPA cited § 110 of the Clean Air Act as authority for the control strategy regulations. There can be no question, however, that § 110 of the Clean Air Act requires the Administrator to approve state implementation plans that are effective in attaining compliance with the national ambient air quality standards and to disapprove those that do not promise reasonable and timely attainment. This Court found as much in *Union Electric, supra.* There, the Court noted that the Administrator is obligated, under § 110, to consider whether it is feasible for a state plan to require more progress than it does, in order to achieve the primary standards "as expeditiously as practicable" and the secondary standards within a "reasonable time." 427 U.S. at 264-65 & n.13.

At a bare minimum, EPA should have considered the effectiveness of its compliance regulations in light of natural and climatological conditions. In light of the evidence that Houston will never be able to comply with the standard, EPA should have reviewed the question of an appropriate control strategy with exceptional care. At the very least, the cost of this futile effort could have been minimized and the reduction in ozone levels, even if insufficient to meet the standard, could have been maximized. EPA's cavalier dismissal of Houston's evidence as to the efficacy of the control strategy did not consider all relevant factors and therefore was arbitrary, capricious and an abuse of discretion.[16] In consequence,

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[16] The standard for review of the control strategy regulations is set forth in the Administrative Procedure Act at 5 U.S.C. § 706, which requires the Administrator to demonstrate a consideration of all relevant factors in promulgating regulations. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The air quality standards themselves are subject to review under separate standards set forth in the Clean Air Act. 42 U.S.C. § 7607.

EPA and the court below have required Houston not only to achieve the impossible, but also to pursue an ineffective means of trying to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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